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Jul 12 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY

Roger M. Young, Sr., Circuit Court Judge

Bethany Aloha Rich,
Appellant,

v.

New Heights Property Management,
Respondent.

APPELLATE CASE NO. 2020-001684

RETURN TO APPELLANT’S SECOND MOTION FOR EXTENSION OF TIME
TO FILE INITIAL BRIEF

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Attorney for Respondent

INTRODUCTION and FACTS

Respondent incorporates by reference the Introduction and Facts in its return to Appellant's first motion for extension of time to file the initial brief. Appellant has not communicated with Respondent anything about needing more time for the initial brief or about any circumstances causing a delay in filing it. By the Court's Order of May 4, 2021, the new deadline became June 3, 2021.

Twenty-seven days later, Appellant filed the instant motion.

LAW

"Within thirty (30) days after receiving the transcript . . . appellant shall serve one copy of his brief on all parties to the appeal, and file with the clerk of the appellate court one copy of the brief with proof of service." Rule 208(a)(1), SCACR. "Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition. A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided." Rule 240(b), SCACR. "Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260." Rule 208(a)(4), SCACR.

“Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties.” Rule 260(a), SCACR. The Court has enforced this rule where appellants have failed to serve and file initial briefs within Rule 208’s deadline. See, e.g., Turner v. Santee Cement Carriers, Inc., 277 S.C. 91, 96, 282 S.E.2d 858, 860 (S.C. 1981) (“Respondent . . . did not file a brief with this Court. Her failure to do so allows this Court to take such action upon the appeal as it deems proper. This failure alone would justify reversal; however, we simply consider it as an additional ground.”); State v. Serrette, 375 S.C. 650, 651, 654 S.E.2d 554, 555 (Ct. App. 2007) (“Though South Carolina affords criminal defendants the opportunity to appeal, the right to an appeal may be lost through a variety of actions by an appellant, such as: (1) . . . ; (2) failure to serve and file an initial brief and designation of matter under Rule 208(a)(4), SCACR;”).

The Supreme Court’s order 2020-05-29-02, “Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020),” forgave procedural defaults in two contexts, neither of which applies here, since the first ended on June 8, 2020, and the second ended on April 9, 2020. Order 2020-05-29-02 at (1)(2)-(3). The sparing nature of any residual forgiveness of

procedural defaults allowed under said order is demonstrated by the Supreme Court’s footnote to the first context just described: “As explained by the order of March 20, 2020, this automatic extension was intended to give ‘lawyers and self-represented litigants appearing before the Appellate Courts ... time to take actions to protect themselves and their families.’ Since sufficient time has been provided for this to occur, and most lawyers and litigants have been able to adjust to working remotely, this automatic extension is no longer warranted.” Order 2020-05-29-02 at (1)(2) n.4.

“Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require. This Rule does not apply to any matters where counsel is required by law to pursue an appeal or petition for writ of certiorari even though the matter may be frivolous.” Rule 269, SCACR.

ARGUMENT

Appellant offers, as the sole excuse for its failure to obey the court’s order granting its first extension of time, a failure to communicate with her attorney about filing it. Appellant seems to be requesting that not only the Court, but Respondent and the property owners (who, it bears repeating, are dealing with

terminal illness and, because of appellant's failures to pay full rent and bond, face the specter of foreclosure on the property), not only get involved with but tolerate this failure to communicate--a failure that must be assumed (since the motion itself avoids any substance and only tersely describes it in its most general terms) to have no more gravity or exigency than the normal garden-variety communication that occurs every day between a party and its attorney about meeting deadlines. Such a motion should be deemed frivolous under Rule 269, SCACR, lest the Court find it has inadvertently sanctioned such motions in every appeal that hinge upon the humdrum tedium of communications' crossed wires such as " 'But I thought *you* were going to write the brief.' 'No, I emailed you about that Thursday. Didn't you get my email?!' "

Whatever has occurred between appellant and her attorney seems to be a problem quite properly borne by the two of them exclusively, rather than all of the people involved in this appeal. As it is, such an eleventh hour Hail Mary--that does not seek permission to allow a predicted need for time before a deadline's passing, but seeks forgiveness, after the fact, for the secret performance of such an elementary failure to communicate--should be regarded as not only insipidly deniable, but eminently frivolous as well.

CONCLUSION

Appellant's Motion should be denied, her appeal dismissed, and Respondent's costs and fees should be awarded to Appellant (Respondent intends, should dismissal occur, to file a Rule 222(d) motion upon this Court's remittitur). At the least, a hearing on the Motion should be had so that Respondent could have a meaningful opportunity to hear, then address, its merits.

Respectfully submitted,

s/Scott Riddell

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CERTIFICATE OF SERVICE OF RESPONDENT’S RETURN TO
APPELLANT’S SECOND MOTION FOR EXTENSION TO FILE AND SERVE
INITIAL BRIEF

I certify that I served this return to Appellant’s second motion for an extension to file and serve the initial brief on Appellant’s counsel via email (attached) on July 12, 2021 to:

jwkuykendall@jwklegal.com

s/Scott Riddell, Esquire

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